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In The
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

vs.

ROBERT GENTRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE* ACE AMERICAN INSURANCE COMPANY; BALLY TOTAL FITNESS CORPORATION; RALPHS GROCERY COMPANY; RENT-A-CENTER, INC. AND 24 HOUR FITNESS USA, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief of *amici curiae* in support of Petitioner Circuit City Stores, Inc. is submitted by ACE American Insurance Company; Bally Total Fitness Corporation; Ralphs Grocery Company; Rent-A-Center, Inc. and 24 Hour Fitness USA, Inc. pursuant to Rule 37 of this Court. *Amici* urge that the Court grant the requested petition for writ of certiorari and reverse the judgment of the Supreme Court of California.

ACE American Insurance Company provides insurance and reinsurance for a diverse group of corporate and consumer clients. ACE American Insurance Company currently has approximately 2,500 employees throughout the United States, including substantial numbers in California.

Bally Total Fitness Corporation is a leading provider of fitness services, operating approximately 350 fitness clubs nationwide. Bally Total Fitness Corporation has more than 20,000 employees in approximately 30 states, including substantial numbers in California.

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[1] Counsel of record received timely notice of the intent to file this brief under Rule 37.2(a). Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Ralphs Grocery Company runs more than 400 supermarkets under the Ralphs, Food 4 Less, and Foods Co. banners, mostly in California but also in Illinois, Indiana, and Nevada. The company also runs warehouse-style stores under the Food 4 Less and Foods Co. banners. Ralphs Grocery Company has approximately 35,000 employees, including substantial numbers in California.

Rent-A-Center, Inc. is a nationwide rent-to-own chain. Its stores offer name-brand furniture, electronics, appliances and computers through flexible rental purchase agreements that generally allow the customer to obtain ownership of the merchandise at the conclusion of an agreed upon rental period. It owns and operates more than 3,400 stores in North America and Puerto Rico under the Rent-A-Center, Rent-Way, Rent Rite, Rainbow Rentals, and Get It Now names and franchises almost 300 through subsidiary ColorTyme. It has over 21,000 employees, including substantial numbers in California, and operates in all of the United States.

24 Hour Fitness USA, Inc. is a privately owned and operated leading fitness center chain. It owns and operates more than 350 fitness centers that offer aerobic, cardiovascular, and weight lifting activities to more than 3 million members. 24 Hour Fitness USA, Inc. employs nearly 20,000 employees in 14 states, including substantial numbers in California.

Amici are employers who require or request that their applicants and employees enter into arbitration

agreements that contain in one form or another class action waiver clauses such as that which is at issue in the instant case. Together, the *amici* employ almost 100,000 individuals across the United States, including substantial numbers in California. Accordingly, *amici* have a direct and substantial interest in the outcome of the instant case.

SUMMARY OF ARGUMENT

The enforceability of employment arbitration agreements as written is of paramount importance to employers and should be addressed by the U.S. Supreme Court.

The enforceability of employment arbitration agreements is an issue of rising significance. Studies undertaken in the last 15 years show a dramatic rise in the use of employment arbitration agreements. *Amici* are just a few of the large number of employers in the United States that have a significant interest in the outcome of the instant case.

Despite the increasing importance of employment arbitration agreements, since 2000, the California Supreme Court has imposed ever-deepening layers of requirements and limitations on such agreements. The first layer of requirements was imposed by *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000) ("*Armendariz*") with respect to actions brought under the California Fair Employment and Housing Act ("FEHA"). *Little v.*

Auto Stiegler, Inc., 29 Cal. 4th 1067 (2003), *cert. denied*, 540 U.S. 818 (2003) ("*Little*") extended the *Armendariz* requirements to the California tort of wrongful termination in violation of public policy. Then, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) ("*Discover Bank*"), the California Supreme Court imposed another set of restrictions upon *consumer* arbitration agreements that contain class action waiver clauses. Most recently, in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007) ("*Gentry*"), the California Supreme Court added yet another set of requirements for *employment* arbitration agreements that contain class action waiver clauses. The California Supreme Court's requirements and restrictions upon employment arbitration agreements conflict with the preemption principles of Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and the opinions of this Court.

The California Supreme Court's divergence from the FAA and opinions of this Court must be checked. *Gentry* directly contradicts federal authority and also adds to a lack of uniformity among the states. Accordingly, the Court should grant the writ of certiorari.

ARGUMENT

I. THE ENFORCEABILITY OF EMPLOYMENT ARBITRATION AGREEMENTS IS A SIGNIFICANT ISSUE FOR NATIONWIDE EMPLOYERS.

The enforceability of employment arbitration agreements as written is of increasing importance to employers that conduct business in California and the other states.

Since the U.S. Supreme Court's landmark decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ("*Gilmer*"), the use of employment arbitration has risen steadily. Although there is no public standard data set indicating the percentage of organizations that have adopted employment arbitration procedures, a series of studies show the upward trajectory of the use of such procedures among U.S. employers. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 Employee Rights and Employment Policy Journal 2 (2007).

As reported by Professor Colvin, a 1992 survey indicated that approximately *2 percent of employers* had adopted employment arbitration agreements for nonunion employees. *Id.*; *see also* Peter Feuille & Denise R. Chachere, *Looking Fair and Being Fair: Remedial Voice Procedures in Nonunion Workplaces,* 21 J. Mgmt. 27 (1995). A 1995 survey by the General Accounting Office (GAO) found that approximately *9.9 percent of employers* surveyed had adopted employment

arbitration procedures for nonunion employees. General Accounting Office, GAO/HEHS 95-150, Employment Discrimination, Most Private Sector Employers Use Alternative Disputes Resolution 7-8 (1995), available at www.gao.gov/archive/1995/he95150.pdf. In a 2003 survey of employers in the telecommunications industry, *22.7 percent of non-union employees* were covered by employment arbitration procedures.

Because large employers are more likely to have relatively sophisticated human resources management practices, such as more elaborate employment dispute resolution procedures, the proportion of employees subject to employment arbitration agreements likely is higher than the proportion of employers subject to employment arbitration agreements.

Accordingly, the issues presented in the instant case have significant, widespread implications for *amici* as well as nationwide employers and should be addressed forthwith.

II. THE CALIFORNIA SUPREME COURT HAS IMPOSED EVER-BURGEONING AND IMPERMISSIBLE CONDITIONS TO THE ENFORCEABILITY OF EMPLOYMENT ARBITRATION AGREEMENTS.

Culminating in *Gentry*, in recent years, the California Supreme Court has imposed a series of requirements for employment arbitration agreements that conflict with principles of FAA preemption and the opinions of this Court. The divergence not only

conflicts with federal authority, but also creates a lack of uniformity among the states. Employers doing business in California, therefore, face unique obstacles to the enforcement of their arbitration agreements.

A. The FAA Preempts State Law Restricting The Enforcement Of Arbitration Agreements That Does Not Apply To Contracts Generally.

Arbitration agreements governed by the FAA must be enforced under the same rules that apply to any contract. Specifically, the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*.

9 U.S.C. § 2 (emphasis added).

The FAA was enacted to overcome courts' reluctance to enforce arbitration agreements. 9 U.S.C. § 1 *et seq.*; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121-122 (2001); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000) (the Supreme Court "rejected

generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be-complainants'"); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 270 (1995); *Perry v. Thomas,* 482 U.S. 483, 490-491 (1987) (the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce clause . . . the preeminent concern of Congress . . . was to enforce private agreements"); *id.* at 492 n.9 ("state law . . . is applicable *if* that law arose to govern issues concerning . . . contracts generally"); *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984) (in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (the FAA evidences Congress' intent "to move the parties to an arbitrable dispute and into arbitration as quickly and easily as possible") ("*Moses H. Cone*").

The creation of a defense specifically applicable to arbitration agreements violates the FAA. *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687-688 (1996) (the FAA preempts state legislation that would restrict the enforcement of arbitration agreements) ("*Casarotto*"); *see also Preston v. Ferrer,* ___ U.S. ___, 128 S. Ct. 978 (2008); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 442-443 (2006) ("*Buckeye*

Check Cashing"); *Volt Info. Sciences v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 474 (1989) (arbitration agreements are enforced "in accordance with their terms," although enforcement is limited by general contract principles "at law or in equity for the revocation of any contract"); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 n.11 (1984) (Congress "intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements" based on state laws that do not provide a basis for the revocation of any contract); *Moses H. Cone* at 24-25 (section 2 of the FAA reflects "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

This preemption rule applies even where a state's public policies would otherwise prevent enforcement. For example, in *Buckeye Check Cashing*, the United States Supreme Court reversed a Florida Supreme Court ruling that required certain otherwise arbitral issues to be litigated in court. The Court held that a state's public policy cannot dictate the forum for the resolution of disputes when an arbitration agreement governed by the FAA requires that the forum be that which was chosen by the parties to the agreement. *Id.* at 446 ("we cannot accept the . . . conclusion that enforceability of the arbitration agreement should turn on [state] public policy and contract law" (internal quotations omitted)); *accord*, *Preston v. Ferrer*, 128 S. Ct. 978; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55, 58 (1995) (FAA

precludes judicially created rules hostile to enforcement of arbitration agreements notwithstanding their bases in a state's public policy).

In *Gilmer*, the Court recognized that statutory claims, even where the statutes were intended to further important social policies, are arbitrable, unless Congress evinced an intention to preclude waiver of judicial remedies. 500 U.S. at 26-27. This Court also expressly rejected the argument that arbitration procedures cannot adequately further statutory purposes merely because they do not provide for class actions. *Id.* ("if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the . . . ADEA . . . provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred").

B. The California Supreme Court's Rulings Overstep FAA Principles.

In approximately 2000, the California Supreme Court signaled its departure from FAA principles, opinions of this Court, and authority in other jurisdictions. The departure has culminated in *Gentry*.

1. *Armendariz v. Foundation Health Psychcare Services, Inc.*

In *Armendariz*, the California Supreme Court held that claims brought under the California Fair Employment and Housing Act (FEHA), Cal. Gov't

Code § 12900, are arbitrable "*if* the arbitration permits an employee to vindicate his or her statutory rights." *Armendariz* at 91 (emphasis in the original).

The California Supreme Court recognized that the FAA generally preempts state legislation that would restrict the enforcement of arbitration agreements. *Casarotto* at 687-688. However, despite that recognition, the California Supreme Court imposed four affirmative obligations for enforcement of mandatory pre-dispute arbitration agreements otherwise applicable to FEHA claims: neutrality of the arbitrator, adequate discovery, a written decision that will permit judicial review, and apportionment of costs of arbitration on the employer solely. *Id.* at 103-113.

In doing so, the California court focused on language of *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985), which states, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). The California court also focused on *Gilmer* at 33-34, suggesting that "*Gilmer,* both explicitly and implicitly, placed limits on the arbitration of such rights. . . . *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes." *Armendariz* at 101. The California Supreme Court thus reasoned that "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA." *Id.* at 101.

The problem with this approach was that the unwaivable "statutory rights" described in *Armendariz* were nowhere to be found in the text of the FEHA. The California Supreme Court, however, offered two provisions of California contract law that ostensibly permit the invalidation of a contract on public policy grounds: California Civil Code section 1668 ("all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law") and California Civil Code section 3513 ("[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for public reason cannot be contravened by private agreement"). *Id.* at 100-101. The court reasoned that the public, as well as individuals, have an interest in FEHA cases. *Id.* at 100 (describing the public policy against unlawful discrimination). The California Supreme Court analyzed objections to the arbitration agreement for unconscionability, a defense applicable to any contract; however, the California Supreme Court's four minimum factors were not based on unconscionability analysis. *Id.* at 113-127.

2. *Little v. Auto Stiegler, Inc.*

The California Supreme Court expanded *Armendariz's* reach in *Little*, which held that in order for a common law tort cause of action for wrongful termination in violation of public policy to be arbitrable,

the employment arbitration agreement must adhere to the four minimum standards set forth in *Armendariz*.

The California Supreme Court followed the reasoning of *Armendariz*, explaining that the four minimum standards "were founded on the premise that certain statutory rights are unwaivable" and that "because an employer cannot ask the employee to waive [a claim for wrongful termination in violation of public policy], it also cannot impose on the arbitration of these claims such burdens or procedural shortcomings as to preclude their vindication." *Little* at 1076. The Court rejected FAA preemption on the ground that "although the *Armendariz* requirements specifically concern arbitration agreements, they do not do so out of a generalized mistrust of arbitration per se." *Little* at 1079, *quoting Casarotto* at 687.

3. *Discover Bank v. Superior Court.*

In *Discover Bank*, the California Supreme Court set limits on the enforceability of consumer arbitration agreements that contained clauses waiving the right of the parties to bring class claims. The Court concluded that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable. . . ." *Discover Bank* at 153. The Court explained, "because . . . damages in a consumer case are often small . . . the class action is often the only effective way to halt

and redress exploitation." *Id.* Thus, in effect, where disputes between contracting parties:

> predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . such waivers are unconscionable under California law and should not be enforced.

Id. at 162-163. This rule applied even if any individual could fully vindicate his or her personal right to recovery by invoking the arbitral forum.

Discover Bank, like *Armendariz* and *Little*, relied on California Civil Code section 1668 ("all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law"). However, this time, the California Supreme Court based its opinion on unconscionability as well as public policy grounds. *Discover Bank* at 161 ("class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy").

The Court explained *Gilmer* by observing that "the ADEA is an employment discrimination statute in which large individual awards are commonplace." *Id.* at 168. *Gilmer*, however, is not premised on this

supposed distinction. Moreover, the California court recognized its divergence from opinions in other jurisdictions: "We acknowledge that other courts disagree. Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable." *Id.* at 161 (citations omitted).

4. *Gentry v. Superior Court.*

This line of California authority culminates in *Gentry*, an employment class action based on alleged violation of state wage and hour laws. The California court held that, "at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws." *Gentry* at 559. *Gentry* is even further afield from FAA and U.S. Supreme Court authority than *Armendariz, Little*, and *Discover Bank*, and it sets up unique barriers to contract enforcement that find no counterpart anywhere else.

In reaching its conclusion, the California court stated that "we had no occasion in *Discover Bank* to consider whether a class action or class arbitration waiver would undermine the plaintiff's statutory rights." *Id.* at 562. The *Gentry* court, citing *Armendariz,* however, retreated from contractual unconscionability analysis and relied instead upon the conclusion that minimum wage and overtime requirements under the California Labor Code are nonwaivable. *Gentry* at 451 ("a finding of procedural

unconscionability is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights . . . [b]ut such a finding is a prerequisite to determining that the arbitration agreement as a whole is unconscionable"); *id.* at 467 (" . . . the validity of class arbitration waiver was analyzed in the previous part of this opinion in terms of unwaivable statutory rights rather than unconscionability").

The California Supreme Court closely followed *Bell v. Farmers Ins. Exchange,* 115 Cal. App. 4th 715, 746 (2004) ("*Bell*"), which addresses California class certification standards but does not involve enforcement of an arbitration contract or, indeed, *any* contract. The *Gentry* court expressed concern that in the absence of the availability of class relief, class members may be left with (citing *Bell*) "no more than the prospect of 'random and fragmentary enforcement' of the employer's legal obligation to pay overtime." *Gentry* at 462. The Court reasoned that the availability of class actions "eliminates the possibility of repetitious litigation" and warned of the "inefficiency" of separate, non-class proceedings. *Id.* at 459.

The California Supreme Court tasked the trial courts, when determining whether to enforce a class action waiver clause in an employment arbitration agreement, with consideration of four factors, three of which were added for the first time to an already complex equation: (1) the modest size of the potential individual recovery (first announced in *Discover Bank*), (2) the potential for retaliation against members of

the class, (3) the fact that absent class members may be ill-informed of their rights, and (4) "other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration." *Gentry* at 463.

Following *Gentry*, California employers and employees have little or no control over whether an arbitral class action waiver clause will be enforced. Indeed, inasmuch as the *Gentry* factors find their genesis in California's public policy supporting certain class actions, contract law analysis is but an afterthought. Because the enforceability of an employment arbitral class action waiver clause now depends on these new and not well defined factors, rather than the language of the arbitration agreement, the outcome of a *Gentry* analysis is impossible to predict and certain to engender one court battle after another, rather than "mov[ing] the parties to an arbitrable dispute . . . into arbitration as quickly and easily as possible." *Moses H. Cone* at 24-25.

This lack of predictability, in fact, *undermines* California contract law because "predictability of the consequences of actions related to employment contracts is important to commercial stability." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696 (1988).[2]

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[2] The *Foley* Court rejected arguments that a "special relationship" akin to insurer/insured existed in the employment context. 47 Cal. 3d at 693. *Foley*, instead, found "no sound reason to exempt the employment relationship from the ordinary rules of

(Continued on following page)

III. *GENTRY* CONFLICTS WITH FEDERAL LAW ON NUMEROUS GROUNDS.

A. *Gentry* Does Not Find Support In Congressional Policy.

Gentry imposes limitations on arbitration agreements that do not apply to contracts generally. Its reliance on *Bell* and retreat from contract law unconscionability analysis demonstrates its departure from accepted FAA principles. Public policy bases for the certification of certain class actions have nothing to do with contract law and therefore are not a ground that exists in law or equity for the revocation of any contract. 9 U.S.C. § 2.

Congress has not elevated the availability of state court class actions above the enforcement of arbitration agreements governed by the FAA. To the contrary, in 2005 Congress expressed deep suspicion of such class actions in the Class Action Fairness Act ("CAFA"). In its statement of Findings and Purpose, Congress described "abuses of the class action device" that have "harmed class members" as well as defendants, "adversely affected interstate commerce" and "undermined public respect for our judicial system." Congress found, "Class members often receive little or

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contract interpretation. . . ." *Id.* at 681. *Perry v. Thomas*, 482 U.S. at 492 n.9, forbids courts from construing an arbitration "agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law."

no benefit from class actions, and are sometimes harmed," citing large counsel fees, inadequate awards to the class or excessive awards to certain class members, and confusing class notices. It particularly expressed concern with class action "[a]buses" in the "State and local courts." See 28 U.S.C. § 1711 ("Findings and Purposes"), Pub.L. 109-2, Feb. 18, 2005, 119 Stat. 4.

Thus, *Gentry's* reliance on various *state* public policies supporting the availability of class actions as a way to defeat enforcement of arbitral class waiver clauses cannot be reconciled with any Congressional policy.

B. *Gentry's* Rationale Is Inconsistent With FAA Principles.

A major premise of *Gentry* is that in the absence of the availability of class relief, class members may be left with (citing *Bell*) "no more than the prospect of 'random and fragmentary enforcement' of the employer's legal obligation to pay overtime." *Gentry* at 462. The California court reasoned that the availability of class actions "eliminates the possibility of repetitious litigation" and warned of the "inefficiency" of separate, non-class proceedings. *Id.* at 459.

California's approach highlights a divergence of authority that should be reconciled by this Court. Indeed, this Court has rejected similar arguments as a ground for defeating enforcement of arbitration agreements. *See Dean Witter Reynolds v. Byrd,* 470

U.S. 213, 217 (1985) ("[the FAA] requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"); *Moses H. Cone* (rejected the inefficiency argument, explaining, "[t]hat misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement"). *Accord*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-294 (2002); *Casarotto* at 688; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. at 54; *Volt Info. Scis., Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. at 475-479 (all holding that arbitration agreements must be enforced in accordance with their terms). *See also Phila. Reinsurance Corp. v. Emplrs. Ins. of Wausau*, 61 Fed. Appx. 816, 819 (3rd Cir. 2003) ("A district court must [] abide by the terms of the parties' agreement [to arbitrate] even if it produces inefficient results"); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1517 (10th Cir. 1995) (litigation must proceed in "piecemeal" fashion if the parties intended that some matters, but not others, be arbitrated); *Dean Witter Reynolds, Inc. v. Prouse*, 831 F. Supp. 328, 331 (S.D.N.Y. 1993) ("the intent of the [FAA] is to enforce private arbitration agreements even at the expense of complex and inefficient dispute resolution"); *Smith v. Pay-Fone Systems, Inc.*, 627 F. Supp. 121, 125 (N.D.

Ga. 1985) ("the mere fact that plaintiff's antitrust claims may be intertwined with the arbitrable claims is no longer a basis for denying arbitration"); *Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76, 79 (S.D. Fla. 1985) ("Arbitrable claims should be submitted to arbitration without regard to the status of the claims to be litigated in court"); *Hallmark Indus. v. First Systech Int'l, Inc.*, 203 Ariz. 243, 246 (2002) ("Any inefficiency or risk of inconsistent results is a consequence of the parties' bargaining").

Even the California Supreme Court, in a previous decision, has rejected this argument. *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 831 (1999) ("policies favoring the efficiency of private arbitration as a means of dispute resolution must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed as the parties themselves have agreed").

CONCLUSION

The instant case is of paramount importance to the many employers who have employees covered by arbitration agreements. California's increasing divergence from FAA principles must be checked. The writ of certiorari should be granted.

Respectfully submitted,

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